John Keller d/b/a Union Carbide Building Co. and Schmelzer-Wysong Management Co., its Agent and/or Joint Employers and Schmelzer-Wysong Management Co. and Building Maintenance Company d/b/a Kansas City House & Window Cleaning Co., its Agent and/or Joint Employers *and* Service Employees International Union Local No. 96, AFL-CIO. Case 17-CA-10019

14 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 5 October 1982 Administrative Law Judge Joan Wieder issued the attached decision. The General Counsel and the Union filed exceptions and supporting briefs, and Respondent John Keller d/b/a Union Carbide Building Co. and Respondent Schmelzer-Wysong Management Co. filed cross-exceptions and briefs in support of their cross-exceptions and in opposition to the General Counsel's and the Union's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] Because they adopt the judge's dismissal of the complaint in its entirety, Chairman Dotson and Member Hunter find it unnecessary to pass on the judge's finding at fn. 4 of her decision that timely service on one joint employer necessarily constitutes adequate service on other joint employers.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administative Law Judge. This case was tried before me at Kansas City, Kansas, on June 22, 1982,[1] pursuant to a complaint[2] issued by the Regional Director for Region 17 of the National Labor Relations Board on April 14, 1981, and which is based on a charge filed by Service Employees International Union, Local 96, AFL-CIO (the Union), on November 6, 1980, and amended on April 9, 1981, alleging violations of Section 8(a)(5), (3), and (1) of the National Labor Relations Act (the Act).

[1] All dates herein refer to 1980 unless otherwise indicated.

[2] The complaint was amended at trial without objection.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.[3] Based on the entire record of the case, on the timely briefs filed on behalf of the parties, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The issues in this case center around the relationship between the Respondents which the General Counsel contends is that of joint employers.[4] The facts are primarily uncontroverted. The Respondents' interrelationship centers around the Union Carbide Building in downtown Kansas City, Missouri. John Keller and his brother, Charles, purchased the building in 1978 from Paul Ingram and his wife.[5] At the time of this purchase, S-W was managing the Union Carbide Building and Ingram suggested Keller retain their services.

B. *The Relationship Between Union Carbide Building Corporation and Schmelzer-Wysong*

One of the partners of S-W, Charles J. Schmelzer, has been managing the Union Carbide Building since 1946, when it was owned by Washington University.[6] The Kellers and S-W entered into an agreement dated October 18, 1978, whereby S-W would be UCBC's management agent for the Union Carbide Building. S-W agreed to perform "all normal management services in behalf of Owner," including but not restricted to the following:

[3] Respondent John Keller d/b/a Union Carbide Building Company (Keller or UCBC) filed a reply brief in addition to its initially timely filed brief. No permission was sought to file reply briefs and there was no showing such a filing was authorized. This reply brief was not considered in reaching the decision in the proceeding. Respondent UCBC admits, and I find, that it is an employer engaged in commerce within the meaning of Sec. 2(11) of the Act. The parties stipulated that the Union is a labor organization within the meaning of Sec. 2(5) of the Act. Respondents Schmelzer-Wysong Management Company (Schmelzer or S-W) and Building Maintenance Company d/b/a Kansas City House & Window Cleaning Company (Building Maintenance or KC) did not deny the allegations contained in the complaint that they were employers engaged in commerce as defined by the Act and, therefore, it is found that all the Respondents meet the Board's jurisdictional standards.

[4] S-W has made a motion to dismiss the complaint insofar as it alleges they committed any violations of the Act, asserting they were never timely served with the original charge within the time period required by Sec. 10(b) of the Act or in accordance with Sec. 102.111 of the Board's Rules and Regulations. The adequacy of service is dependent on the determination of the joint employer issue. If Keller and S-W are found to be joint employers, then the admittedly timely service on Keller is sufficient notice to the other joint employer(s). See *Bluefield Sanitarium*, 213 NLRB 515 (1974), and *Photo-Sonics*, 254 NLRB 567 (1981). Accordingly, if dismissal is warranted on the basis of a finding that the General Counsel failed to meet its burden of proof that Keller and S-W are joint employers, dismissal is also warranted on the basis that S-W was not properly served.

[5] The Ingrams owned the building as the 912 Building Company. When the Kellers purchased the building, they also purchased from the Ingrams another office building known as the Crossroads Building.

[6] The Ingrams purchased the building from Washington University in 1964.

1. Maintaining occupancy of the highest possible potential with tenants on terms acceptable to the Owner.

2. Supervise and schedule Owner's employees at the building to achieve maximum results at lowest costs consistent with providing high standards of building maintenance and tenant services.

3. Collect and account for all monthly rentals and other charges due from tenants and deposit such payments in the "Union Carbide Building Operating Account."

4. Pay out from the aforesaid Union Carbide Building Operating Account all normal and usual operating expenses incurred by the Agent in behalf of the Owner, including payrolls for building employees as may be determined.

5. Maintain complete monthly operating accounts and deliver to Owner monthly operating statements as of the end of each month, said statements to be delivered as soon as practical—normally on or before the 10th day of the month following the month which is covered in the statement.

6. At the direction of the Owner to make such other disbursements from the operating account as may in the Owner's judgment be required.

7. At such times as maintenance services may be required which are beyond the capabilities of the building employees, Agent shall order such services performed and on determination of satisfactory completion shall reimburse such contractors from funds available in the operating account.

8. Agent will be responsible for leases and occupancy agreements with all tenants in the building and will keep Owner informed as to negotiations. Agent will submit all leases and occupancy agreements to Owner for approval before final delivery to tenants of such agreements.

9. On any recommendation for major maintenance or alteration expense, Agent will first secure Owner's approval before committing Owner to any expense in excess of Seven Hundred Fifty Dollars ($750.00) provided that in the event of an emergency, Agent may use its best judgment to affect [sic] necessary restoration of service with the understanding that Agent will notify Owner promptly of its action.

10. Owner agrees to name Agent in all insurance covering liability claims against the building.

11. Everything done by the Agent under the provisions of this agreement shall be done as Agent of the Owner and all obligations or expenses incurred by the Agent with respect to the operation of the Union Carbide Building shall be for the account on behalf and at the expense of the Owner. Any payments to be made by the Agent as aforesaid shall be made out of such sums as are available in the aforesaid Union Carbide Building Operating Account or as may be provided by the Owner, and the Agent shall not be obligated to make any advance to or for the account of the Owner or to pay any sum, except out of funds held or provided as aforesaid, nor shall the Agent be obligated to incur any liability or obligation for the account of the Owner without the assurance that the necessary funds for the discharge thereof will be provided.

For these enumerated services, S-W received a fee which was a fixed percentage of the building's gross revenues. The agreement authorized S-W to hire, fire, and pay the wages of the employees pursuant to the schedule set forth in the BOMA contract, which J. Keller knew, as found herein.

Originally, S-W employed maids and matrons until about 1975, when it determined to have the cleaning performed by a service company. S-W also employed maintenance employees,[7] and continued to do so after subcontracting the cleaning services to Tombs Janitorial Service (Tombs) in 1975. Both prior and subsequent to contracting with Tombs, the cleaning and maintenance employees were represented by the Union.

In 1975 S-W had two cleaning employees, Mabel Slay and Georgia Caldwell,[8] who were paid by the Schmelzer-Wysong Management Company, agents for Union Carbide Building, out of the bank account specifically maintained for the purpose of managing the building. The cleaning and maintenance employees were paid by S-W according to the terms and conditions of a series of collective-bargaining agreements negotiated by the Union and the Building Owners Management Association (BOMA).[9] Membership in BOMA was originally by building name, and the Union Carbide Building has been a member since the 1930's. S-W paid the dues, which were due quarterly, to BOMA from the UCBC/S-W account.

Schmelzer served on the BOMA negotiating committee two or three times in 1970, 1973, and possibly in 1976. After entering into the management agreement with the Kellers, Schmelzer executed a collective-bargaining agreement with the Union on September 1, 1979. During the negotiation of the 1979 collective-bargaining agreement, Schmelzer reported to J. Keller on the status of negotiations and believes he supplied Keller with a copy of the agreement.[10]

The record clearly establishes that S-W is the agent of UCBC. Section 2(2) and (13) of the Act provides, as here pertinent, "The term 'employer' includes any person acting as an agent of an employer, directly or indirectly . . . . In determining whether any person is acting as an 'agent' of another person so as to make such other

[7] As here pertinent, the only maintenance employee working for S-W was Junius Johnney, the superintendent of the building.

[8] Prior to 1975, the size of the cleaning force varied according to the occupancy rate.

[9] BOMA is an association of building owners and managers. In addition to negotiating collective-bargaining agreements, BOMA engaged in promoting the downtown area of the city to attract more business, lobbying various governmental agencies, indicating the problems and offering courses on how to manage a building.

[10] J. Keller's denial of any awareness of the BOMA contract until after the charges were filed in this proceeding is not credited based on demeanor, inherent probabilities, and inconsistencies in his testimony such as admitting that Schmelzer informed him that expenses would go up because of the increase "scheduled in the contract" and also admitted that Schmelzer listed in his accountings to him the BOMA dues payments, which Keller asked about once, and Schmelzer relied, "some building owners' group."

person responsible for his acts, the question of whether the specific acts performed were authorized or subsequently ratified shall not be controlling."[11] S-W was expressly given broad authority in the management agreement over UCBC employees, asserted its agency without refutation or contradiction, maintenance of the building, the accounts and leases. Inasmuch as the common law principles of agency are applicable, UCBC cannot deny any responsibility for S-W's actions on its behalf such as payments of dues to BOMA, signing the BOMA contract, subcontracting with KC House, and terminating the agreement with KC House pursuant to clear instructions from J. Keller. *Republic Corp.*, 260 NLRB 486 (1981). Based on these uncontroverted facts, including the terms of the "management agreement," UCBC and S-W are found to be joint employers since they share or codetermine matters governing the terms and conditions of the building's employees. *Pacific Hosts, Inc.*, 156 NLRB 1467 (1966), and *Greenhoot, Inc.*, 205 NLRB 250 (1973). Therefore, it is found that S-W is a proper party under Section 10(b) of the Act.

C. *Subcontracting*

The collective-bargaining agreements, since at least 1973, contained a clause regarding subcontracting as follows:

> ARTICLE XIV
>
> Sub-contracting
>
> Any right which accrues to the Employer under this Agreement may be transferred by the Employer to an independent agency selected by the Employer, provided that the assignment itself or the performance of the assigned services by the independent agency in no way violates the provisions of this Agreement.
>
> However, no work currently performed by the employees of the bargaining unit shall be contracted to an independent agency without the mutual consent of the Employer and the Union; provided, that the Employer shall have the right to contract the following work of the bargaining unit: (a) window cleaning; (b) maintenance work beyond the ability of maintenance employees; and (c) that now contracted by the Employer.

In 1976 Schmelzer and the Ingrams considered subcontracting with a cleaning service solely for economic reasons and, in 1977, after considering the bids of several companies, the lowest bidder was chosen, Tombs. Tombs hired the two S-W employees who were cleaning the building, Mabel Slay and Georgia Caldwell. No representatives of Tombs testified and the exact mechanisms employed or the basis for hiring these individuals is not a matter of record. Schmelzer testified that he understood the subcontracting clause to require reemployment of Slay and Caldwell by Tombs but there is no indication that this was a condition precedent to letting the contract.[12] Schmelzer was unsure and unclear in his testimony on this point. Also Schmelzer was uncertain if he secured the Union's approval of the decision to subcontract the cleaning operations initially, stating that he notified the Union and spoke to a business agent named Bob Eisler,[13] and then later stating that he may have told Eisler or gotten his concurrence in advance, but he was not sure.[14]

The record is devoid of any evidence of the wages and the other terms and conditions of employment of Slay and Caldwell paid or granted by Tombs. Schmelzer assumed that Tombs paid the same wages and followed the same contractual scales as he, but there was no showing of whether Tombs had a separate contract with the Union or the actual terms and conditions of employment for Slay and Caldwell. Schmelzer did not know if the employees of Tombs were covered by a collective-bargaining agreement; he just assumed they were. According to Schmelzer, Tombs paid their salaries and made all contributions, if any, to all pension and trust funds. Junius Johnney remained on S-W's payroll. S-W withheld his union dues and made pension contributions to the Union on his behalf until October 31, 1980, when S-W terminated its agreement with UCBC and J. Keller hired him as an employee of Paragon Energy Corporation.

Six months after contracting with Tombs, S-W changed cleaning services and subcontracted with Building Maintenance Company d/b/a Kansas City House and Window Cleaning (KC House), after considering several bids.[15] S-W accepted KC House's bid in December 1977. KC House employed Slay and Caldwell to perform the cleaning duties, and S-W paid a fixed monthly charge,[16] as was the case with Tombs. Subsequently Caldwell retired and Carpenter used Verdell Williams, who was employed elsewhere by KC House, as Caldwell's replacement after consulting with Schmelzer on the identity of the replacement.

KC House had a contract with the Union. That contract was not placed in evidence. According to Carpenter, who responded "Correct" to the leading question, that if a cleaning service company "got a cleaning contract from a BOMA building, then you either by separate contract or by agreement with the union, agreed to pay the BOMA rates."[17] Therefore, the record fails to show

[11] See *NLRB v. New Madrid Mfg. Co.*, 215 F.2d 908 (8th Cir. 1957).

[12] Schmelzer was unclear what the contract required, subsequently testifying that he did not know if the employees had to be hired by the subcontractor, then stating he thought they should be. Later he testified that the obligation was moral, not contractual.

[13] Eisler did not appear and testify.

[14] Similarly, Schmelzer testified he felt no obligation to inform the Union or get its concurrence or approval prior to changing subcontractors.

[15] S-W was dissatisfied with Tombs, the low bidder, and had prior satisfactory experiences with the principal owner of KC House, Carl L. Carpenter. KC House was the second lowest bidder.

[16] It is noted that the initial agreement calls for three people to perform the work, two on weekdays and the third on weekends. There is no mention in the testimony relative to the third employee mentioned in the agreement.

[17] Carpenter further testified:

Continued

if Slay, Caldwell, and then Williams were paid pursuant to the terms and conditions in the KC House contract or the UCBC/S-W/BOMA agreement.[18]

Apparently, the parties thought the KC House contract was terminable on 30 days' notice. Schmelzer described the contract, without contradiction, as a cost-plus agreement. There is no indication on the face of the contract or otherwise that S-W exercised any substantial degree of control over the manner and means employees of KC House used to perform the cleaning services.

On March 10, 1978, Carpenter wrote Schmelzer a proposed increase in monthly charges based on a necessary increase in the weekly manhours expended to perform the service. The letter indicates the increase in manhours was implemented by Carpenter without any consultation with Schmelzer, S-W, Keller, UCBC, or any other entity. S-W agreed to the increase and its acquiescence was not subsequently disavowed by UCBC or any other entity.

Counsel for the General Counsel avers that the contractual relationship between KC House and S-W cojoined with their methods of operation establish that they are joint employers. As stated in *Cabot Corp.*, 223 NLRB 1388 (1978), affd. sub nom. *Workers Local 483 v. NLRB*, 561 F.2d 253 (D.C. Cir. 1977):

> The question of joint employer status must be decided upon the totality of the facts of the particular case. Basically, the determining factor in an owner-contractor situation is whether the owner exercises, or has the right to exercise, sufficient control over the labor relations policies of the contractor or over the wages, hours, and working conditions of the contractor's employees from which it may be reasonably inferred that the owner is in fact an employer of the employees.[3]

[3] See *Westinghouse Electric Corporation*, 163 NLRB 194 (1967).

Based on the uncontroverted facts and circumstances of this case, it is found that the elements of interrelationship do not support a finding that KC House is a joint employer with S-W and/or UCBC. These factors include (1) the terminability of the contract on 30 days' notice;[19] (2) the status of KC House as a separate, independent operation performing similar services for other companies; (3) the lack of common ownership or financial control;[20] (4) UCBC had previously contracted out its cleaning requirements; (5) KC House maintained its own payroll,[21] made all payroll deductions, and maintained separate records; (6) KC House directly assigned work to the employees working at the Union Carbide Building, and set their hours of work consonant with the operating needs of the tenants and the terms of the contract; (7) salaries were based on contractual terms, and counsel for the General Counsel failed to demonstrate which entity negotiated the applicable contract which required the utilization of BOMA wage rates. KC House and S-W understood that KC House was the entity obligated to abide by the terms of the collective-bargaining agreement; (8) KC House was engaged to perform a specific service and determined how that service was performed; and (9) KC House had overall control over the hiring, firing, assignment, and disciplining of its employees, providing the direct supervision over said employees.[22] S-W merely relayed the tenants' complaints to Carpenter or Johnney posted memoranda on a bulletin board; (10) S-W did not deal directly with KC House employees, was not shown to have contacted their employees except for nonwork-related conversations, and even if S-W had the right to disapprove of a particular work assignment or request the removal of an employee as unsuitable, such rights are consistent with policing the contract and do not evidence the right to have the employee fired rather than reassigned elsewhere, or hired and assigned elsewhere;[23] (11) the complaints regarding the cleaning services were directed to KC House;[24] (12) the actual nature of the cleaning staff was not shown to have been determined by S-W and was set by contract; (13) the employees of S-W knew they had no supervisory control or responsibility over KC House employees. None of S-W's or UCBC's supervisors was present at the building during the hours KC House employees worked; (14) fringe benefits, if any, were to be set by KC House; (15) grievances and any other labor relations matters directly affecting the cleaning employees were lodged with KC House;[25] (16) there was no showing that S-W or UCBC had any oversight or control over the granting of vacation time, sick leave, or the setting of holidays, if any,[26] or had to approve temporary replacements for any ill or vacationing employees; (17) KC House was responsible for training its employees and determining if any wage increases would be granted consonant with the terms of the applicable collective-bargaining agreeement and, when the collective-bargaining agreement called for increased wages and benefits, KC House so notified S-W; and (18) any unemployment or other compensation claims which have been filed name KC House as the employer. Accordingly, it is concluded that S-W and/or UCBC did not "exercise effective control over the working conditions of [cleaning employees] . . ." See *Herbert Harvey, Inc.*, 171 NLRB 238 (1968), enfd. 424 F.2d 77 (D.C. Cir. 1969), "were not shown to have been the entities which could have bargained effectively with [the Union] re-

A. I can't recall a specific agreement. It was just—it's just part of the deal, part of the facts when you take a BOMA contract. You can't pay lessor [sic] scale, because there are lesser scales prevailing.

Q. And that obligation was on you because you were a union contractor, you had an agreement with Local 96?

A. Correct.

[18] There are different contracts with the Union which require different wage rates.

[19] While the contract did not entail such a provision, Schmelzer understood termination could be effected on 30 days' notice, which in fact did occur as discussed below.

[20] See *Parklane Hosiery Co.*, 203 NLRB 597 (1973).

[21] *Hychem Constructors*, 169 NLRB 274 (1968).

[22] Ibid.

[23] See *Syufy Enterprises*, 220 NLRB 738 (1975); *Space Services International Corp.*, 156 NLRB 1227; cf. *Cabot Corp.*, supra.

[24] See *Syufy Enterprises*, supra.

[25] *Syufy Enterprises*, supra at 754.

[26] *Sun-Maid Growers of California*, 239 NLRB 346 (1978).

garding the wages, hours and other conditions of employment over which [they] possessed [no] control." See *Herbert Harvey, Inc.*, ibid. Cf. *Sun-Maid Growers of California*, supra.

D. *Termination of the KC House Contract*

In the summer of 1980, S-W presented UCBC the yearend operating figures which showed that the Union Carbide Building was losing money. J. Keller analyzed the operating figures to determine what, if anything, could be done to either increase revenues or lower expenses and determined that the cleaning expenses of the Union Carbide Building were much higher per square foot than the cleaning expenses of his other commercial property, the Crossroads Building.[27] J. Keller suggested that the same cleaning service that was used at the Crossroad's building be used at the Union Carbide Building, suggesting that the duplication in personnel could greatly reduce costs.[28]

Schmelzer consulted with Walter Pearson, a representative of the Union, regarding J. Keller's proposals who, after consideration of the idea, said, "It will not work out." Schmelzer relayed Pearson's statement to J. Keller, who indicated he believed he had the right to hire another cleaning contractor. Subsequently, J. Keller asked Schmelzer to terminate the KC House contract effective October 31, 1980. Schmelzer telephoned Carpenter to inform him of the decision, and then wrote him a letter confirming the cancellation of the contract. Also Carpenter met personally with Schmelzer and was told that the contract with UCBC and S-W would also cease. According to both J. Keller and Schmelzer, another cleaning contractor was providing the service but neither knows if this contractor is a signatory to a collective-bargaining agreement. The individual(s) or company performing this cleaning service were not identified. According to Carpenter, whose testimony is uncontroverted, the cancellation of the Union Carbide Building contract necessitated the termination of Slay and Williams for KC House had no work for them at the time. There is no allegation that KC House had any union animus.

The S-W/UCBC contract was terminated for S-W received a management contract at 10 Main Center Building, which was much larger than the Union Carbide Building, and required moving S-W's office to 10 Main Center. Both Schmelzer and J. Keller agreed that the building manager should maintain offices in the Union Carbide Building; hence, the management agreement was amicably terminated on October 31, 1981.

J. Keller wished to retain Johnney as the Union Carbide Building superintendent and Schmelzer-Wysong offered him employment with J. Keller's company, Paragon Energy Corporation. Johnney consulted his attorney to ensure that his taking the job would not contravene any union rules, after which he accepted the job.

Johnney's affidavit, which he claims he did not read before signing for he could not read the Board agent's handwriting, states: "On October 24, 1980, at about 10 a.m., Mr. John Keller, the building owner . . . called me into his office and told me he was going to go non-union with the building cleaning as of November 1, 1980. . . . I told Mr. Keller that I couldn't get involved in any cleaning or maintenance of the building on a non-union basis." It is this affidavit, which Johnney could not read and would not affirm at the trial, that counsel for the General Counsel alleges shows that termination of the contract resulting in the termination of Slay and Williams was to eliminate the Union. J. Keller asserts he had nothing to do with the hiring or firing of KC House employees, that the decision to change cleaning contractors was solely motivated by economic considerations, not union membership, and that he does not know who currently is performing the cleaning service.

The Johnney affidavit is a prior inconsistent statement and, under Rule 801 of the Federal Rules of Evidence, can be considered as testimony.[29] It was noted on the record that the affidavit was legible to the court and the five counsels for the parties had a question regarding only one word during the consideration of several paragraphs read into the record. The affidavit is credited, based on demeanor, the recency of the events to the affidavit, the cursory nature of the witness' review of the affidavit prior to his stated inability to read the document, inherent probabilities such as the recognized need to consult with his attorney regarding the impact of J. Keller's proposal on his union membership, and indicates that he initialed corrections to the affidavit.

However, there is no showing that the Union was the representative of the employees of UCBC or S-W at the time the actual events occurred herein and, hence, any refusal by them to bargain with the Union about the decision to change subcontractors has not been shown to have been violative of Section 8(a)(5) and (1) of the Act. There is no allegation that KC House, as the employer of the unit represented by the Union, had an obligation to bargain about its decision to terminate Slay and Williams due to lack of work.[30] Further, there is no showing, other than the inadequate inference drawn from Johnney's affidavit, that the subcontractor replacing KC House was in fact nonunion or that the decision to change contractors was motivated by other than economic considerations.

Accordingly, it is concluded that a violation of the Act has not been established for the General Counsel has failed to establish that KC House, S-W, and UCBC are joint employers or that entering into a contract with an unidentified cleaning service was "deliberately designed

[27] Schmelzer testified that J. Keller said seminarians were cleaning the Crossroad Building at the time. J. Keller discusssd with him the great disparity in cleaning costs. There is no indication whether the Crossroads Building was being cleaned pursuant to a contract with a cleaning service similar to KC House. The manager of the Crossroads Building did not appear and testify nor did any contractor or other individual who knew the nature and identity of the cleaning service and/or seminarians who performed the cleaning of the Crossroads Building.

[28] This suggestion indicated that a cleaning service was used but the service was not otherwise identified.

[29] As Judge Learned Hand observed in *Di Carlo v. United States*, 6 F.2d 364 (2d Cir. 1925), when a jury decides that the truth is not what the witness says now but what he said before, they are still deciding from what they see and hear in court.

[30] It is uncontroverted that KC House terminated Slay and Williams due to lack of work. All allegations of animus are made against UCBC.

to eliminate the Union or that the Union was in fact eliminated." *Syufy Enterprises*, supra.

CONCLUSIONS OF LAW

1. John Keller d/b/a Union Carbide Building Co., Schmelzer-Wysong Management Co. and Building Maintenance Company d/b/a Kansas City House & Window Cleaning Co., referred to collectively as the Respondents, are employers within the meaning of Section 2(5) of the Act.

2. Service Employees International Union Local No. 96, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. John Keller and Schmelzer-Wysong are joint employers and/or agents but they are not joint employers and/or agents with Building Maintenance Company, d/b/a Kansas City House & Window Cleaning Co.

4. The Respondents have not engaged in any unfair labor practices as alleged in the complaint.

On the foregoing findings and conclusions and on the entire record, I issue the following recommended[31]

ORDER

It is ordered that the complaint be dismissed.

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[31] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.